

**COST SHARING AGREEMENT BETWEEN
CITY OF MILPITAS AND
MCCARTHY RANCH LIMITED PARTNERSHIP REGARDING THE
McCARTHY BLVD. LAND EXCHANGE —
ELECTRICAL UNDERGROUNDING PROJECT
May 23, 2007**

This Cost Sharing Agreement (“the Agreement”) is made on this _____ day of June, 2007, by and between the City of Milpitas, a municipal corporation, hereinafter referred to as “**City**,” and McCarthy Ranch Limited Partnership hereinafter called “**McCarthy**,” and with the City, collectively, the “**Parties**,” in consideration of the mutual intent to underground certain overhead electrical lines and electrical service facilities (the “**Project**”), including an inactive east-west service and an active north-south service affecting City’s pump station, APN 022-30-005, and McCarthy private property, APN 022-30-033, said north-south service located approximately parallel to the curbline of southbound N. McCarthy Boulevard and approximately seventy feet westward, as more particularly described in Exhibit A (the “**Benefited Properties**”).

RECITALS

WHEREAS, the City and McCarthy propose to undertake a relocation of overhead electrical lines to an underground location on the Benefited Properties; and

WHEREAS, previously existing overhead lines in the vicinity of the Benefited Properties have already been removed or relocated; and

WHEREAS, it is understood and agreed between the Parties that the proposed removal of the overhead lines will bring mutual benefit to the Parties; and

WHEREAS, the benefits to the Parties include removal of PG&E line clearance requirements, removal of restrictions on tree and landscape plantings near the lines, improved site access, visual improvement, and consistency with adjacent properties; and

WHEREAS, the overhead lines north of the pump station building provide power to an electrical service pedestal that serves the city street lighting system and streetscape irrigation system; and

WHEREAS, the Parties intend to maintain electrical service to these systems during the Project without disruption.

NOW, THEREFORE, in consideration of the covenants and obligations set forth herein, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows:

- A. The Parties agree that the Recitals above are true and correct and made a part of this Agreement.

DRAFT

- B. McCarthy Partnership shall implement the Project in collaboration with the City and share the cost of such undergrounding with City on a pro-rata basis based upon benefits accrued to the Benefited Properties. The costs shall correlate to the pro-rata share of property that receives benefit from removal of the overhead lines and relocation of the Pacific Gas & Electric (PG&E) overhead and related underground distribution system that extends to the current service point. The overall cost of the undergrounding project shall be apportioned among and borne by the Parties in proportion to the benefits received for each parcel according to percentage of lineal feet of overhead lines and related underground electrical distribution facilities on each parcel that are removed, or are relocated and undergrounded within the dedicated public easement located along southbound McCarthy Boulevard, as recorded in Santa Clara County Recorder's office on July 28, 2000 as Book 730 of maps, pages 13-16, series number 15336133, indicated thereon as Easement A, and as subsequently modified on February 6, 2004 via recorded instrument number 17605371 of the Official Records of Santa Clara County.
- C. The City agrees to notify and work with PG&E to provide engineering of removal of poles and overhead lines and engineering for installation of a new service drop. The Parties understand that PG&E will implement removal of its overhead lines, poles, and related facilities that provide power to the current service point. The Parties further understand and agree that construction of underground service from the new service drop to the current electrical service point at the existing pedestal will be implemented by other, non-PG&E forces. Implementation will be executed in a manner that neither interrupts nor disrupts power to the pump station site, street lighting or irrigation systems. The Parties further understand and agree that implementation correlates roughly to affected street frontage from the southerly limits of proposed undergrounding to the current service point, along which an active electrical service will be relocated and undergrounded, plus roughly the east-west width of McCarthy's parcel, over which an inactive overhead electrical service will be removed.
- D. City shall submit to McCarthy a written request for reimbursement (the "**Reimbursement Request**") from time to time, but not more often than once a month, as undergrounding costs are incurred. The Reimbursement Request shall itemize in reasonable detail the costs and expenses for which City seeks reimbursement, and for contract work executed by PG&E or construction contractor(s), shall be accompanied by copies of invoices or other documentation showing the amounts paid for the undergrounding and relocation of the electrical lines. Each such Reimbursement Request shall include supporting invoices from the contractor(s) and from supplier(s) as applicable.
- E. In connection with the land exchange between the Parties, the Parties have effected certain lot line adjustments. In connection with these lot adjustments, the Parties will need to set three new property corners and prepare a record of survey. The City will contract with consultant Mark Thomas and Company to perform this work. The costs for the survey work shall be borne equally by the Parties.

DRAFT

- F. The Parties understand and agree that the Project is subject the approval of the City Council and to the availability of an appropriate funding source or sources, availability of City staff and/or other City resources as needed to pursue and cooperate on the Project.
- G. This Agreement is not intended to relieve McCarthy of any existing obligations associated with electrical or utility undergrounding previously committed to by McCarthy via development agreements, tentative maps, assessment districts and procedures, or other executed/approved/adopted/recorded instruments.
- H. This Agreement represents and memorializes all of the Parties' intentions concerning the Project and is complete, adequate and accurately reflects the mutual obligations the Project and its effect on the Benefited Properties. Any alteration or variation of the terms of this Agreement or change of intention must be evidenced in a writing, signed by the Parties hereto.
- I. The Parties shall each indemnify, defend and hold harmless the other Party, and its constituent partners, directors, officers, shareholders, agents and employees, from and against any and all losses, claims, damages, liabilities, costs and expenses (including, without limitation, attorneys' fees, investigative and discovery costs), and any and all other sums which the indemnified Party may pay, or be obligated to pay, or incur, on account of any and all demands, claims, or assertions of liability, arising, or alleged to have arisen, out of, in whole or in part, any act, omission, negligence or misconduct of the indemnifying Party, its agents or contractors.
- J.
 - 1) If a dispute arises relating to the interpretation of, enforcement of or compliance with the terms and conditions of this Agreement, the Parties shall first attempt to resolve it in good faith through informal discussions. Either Party may convene such discussions by written notice ("**Dispute Resolution Notice**"), and shall reasonably accommodate the other Party with respect to scheduling such discussions. If the dispute is not resolved in this manner within thirty (30) days of receipt of the Dispute Resolution Notice, the dispute shall be referred to a non-binding mediation process in accordance with Section J(2) below.
 - 2) The Parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement that are not resolved by their mutual agreement within the thirty (30)-day timeframe specified in Section J (1) above shall, as a condition precedent to litigation thereon, first be mediated. Mediation shall be non-binding and utilize the services of a mediator mutually acceptable to the Parties, and, if the Parties cannot agree, a mediator selected by J.A.M.S. from its panel of approved mediators trained in commercial construction mediation. All unresolved claims shall be submitted to the same mediator. Notwithstanding any provision of this Agreement to the contrary, the Parties shall share equally in any costs or fees for the services of J.A.M.S. and the mediator.
 - 3) The dispute resolution process described in Section J(1) and J(2) above shall be undertaken in good faith and exhausted prior to litigation. However,

DRAFT

compliance with such process does not waive either Party's obligation to comply with, or right to assert as a defense, any applicable statute of limitations. The Parties may agree in writing to toll any applicable statute of limitations for such period as may reasonably be necessary to complete such dispute resolution process. Notwithstanding the foregoing or anything to the contrary contained in this Section J, the Parties are free to institute an action in Superior Court of Santa Clara County, California, seeking a preliminary injunction or temporary restraining order pending submission of the dispute in accordance with the terms of J(1) and J(2), and no Party shall assert this Section as a bar to entry of such relief in the Superior Court. Any temporary restraining order or preliminary injunction issued by the Superior Court shall be reviewable in the normal manner provided by law.

- K. In the event of any legal action, arbitration, or proceeding between the Parties arising out of this Agreement, the prevailing Party shall be entitled to recover from the losing Party or Parties reasonable attorneys' fees and costs in addition to any other judgment or award. For the purpose of this Section, the terms "attorneys' fees and costs" shall mean the fees and expenses of counsel to the Parties hereto, which may include printing, photostating, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals, librarians and others not admitted to the bar but performing services under the supervision of an attorney. The terms "attorneys' fees and costs" shall also include, without limitation, all such fees and expenses incurred with respect to appeals, arbitrations and bankruptcy proceedings, and whether or not any action or proceeding is brought with respect to the matter for which said fees and expenses were incurred.
- J. If any term, covenant, or provision of this Agreement is found by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect, and shall in no way be affected, impaired, or invalidated thereby.
- K. Neither the City nor McCarthy may delegate, assign, sublet, or transfer its duties or interest in this Agreement without the written consent of the other party.
- L. Either party may terminate this Agreement, in whole or in part, in writing, if the other party fails to fulfill its intentions under this Agreement through no fault of the terminating party. However, no such termination is effective unless the other party is given not less than ten (10) calendar days' written notice (delivered by Certified Mail, return receipt requested) of the intent to terminate.
- M. This Agreement shall be interpreted in accordance with the laws of the state of California.

McCarthy shall keep itself fully informed of, and shall observe and comply with, all laws, ordinances, and regulations which in any manner affect those engaged or employed on any work, or the materials and equipment used in any work, or in any way affect the performance of any work, and of all orders and decrees of

DRAFT

agencies having any jurisdiction or authority over work performed under or subsequent to this Agreement.

If any discrepancy or inconsistency should be discovered between this Agreement and any such law, ordinance, regulation, order, or decree, McCarthy shall immediately report the same in writing to City.

- N. McCarthy understands that it shall comply with all applicable federal, state, and local laws, ordinances, rules, and regulations; and lawful orders of all authorities having jurisdiction for the safety of persons during the Project and protection of the Benefited Properties.

The undersigned understand and intend to adhere to all terms and conditions of this Agreement, and the signatories hereto certify and warrant that they are authorized to sign.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in the day and year first above written.

**MCCARTHY RANCH LIMITED
PARTNERSHIP**

THE CITY OF MILPITAS

By: _____

By: _____

Name: _____

Name: _____

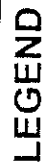
Title: _____

Title: _____

Date: June _____, 2007.

Date: June _____, 2007.

CITY OF MILPITAS
COUNTY OF SANTA CLARA
STATE OF CALIFORNIA



- EXISTING OVERHEAD LINES, POLES & ELECTRICAL SERVICE TO BE REMOVED/RELOCATED
- NEW LOCATION, UNDERGROUND ELECTRICAL SERVICE
- PROPERTY LINE

COST ESTIMATE: \$82,450
PRO RATA SHARE: \$41,225

City of Milpitas, California

BUDGET CHANGE FORM

Type of Change	From		To	
	Account	Amount	Account	Amount
Check one: <input checked="" type="checkbox"/> Budget Appropriation <input type="checkbox"/> Budget Transfer	451-9516079153760	\$43,025	451-951607974800	\$43,025

Explain the reason for the budget change:

In October 2006, the City Council approved execution of a land exchange agreement with McCarthy Ranch Limited Partnership ("McCarthy") in the vicinity of the main sewage pump station. The land exchange resulted in City acquisition of the property that separated the pump station from North McCarthy Boulevard. This acquisition facilitated the construction of the new Main Sewage Pump Station and allowed for a new permanent driveway into the pump station site to improve access and circulation.

Lands along North McCarthy Boulevard are almost all served by underground electrical services. However, the service to the main sewage pump station remains an overhead one. The overhead lines continue beyond the pump station and over McCarthy property to serve the street lighting and landscape irrigation systems for McCarthy Boulevard. The land exchange agreement contained a provision to pursue the opportunity to jointly underground these overhead electrical lines.

A cost-effective opportunity has been identified to remove overhead lines from the pump station northward to the current service cabinet, and to underground this service along the McCarthy Boulevard frontage within an existing easement. Total cost is expected to be approximately \$82,450 and McCarthy is willing to contribute \$41,225. In addition, McCarthy will contribute \$1,800, representing half of the \$3,600 estimated cost to survey and record the new property corners.

Approve a budget transfer of \$43,025 from developer contribution to CP 6079 Main Sewage Pump Station Site Improvement for relocation of electrical overhead lines to underground electrical services.

☒ Check if City Council Approval required.

Meeting Date: June 5, 2007

Itemization of funds, if needed:			Amount
Requested by:	Division Head:	Date:	
	Department Head:	Date:	
Reviewed by:	Finance Director: <i>Dr. C. Hall</i>	Date: <i>5/30/07</i>	
Approved by:	City Manager:	Date:	
Date approved by City Council, if required:			Confirmed by: